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FOREIGN INVESTMENT

Implementation of Exon-Florio and Related Amendments



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Foreign Investment:
Implementation of
Exon-Florio and
Related Amendments

In 1988, Congress enacted the Exon-Florio legislation¹ authorizing the President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. companies when there is credible evidence that a foreign controlling interest might threaten national security and when other legislation cannot provide adequate protection. The President delegated authority to review foreign investment transactions to an interagency group, the Committee on Foreign Investment in the United States (CFIUS).

As requested, we examined CFIUS implementation of the Exon-Florio legislation and related amendments. Specifically, we focused on (1) the characteristics of foreign investments and the extent to which these investments are reported to CFIUS and (2) the factors CFIUS considers in making decisions on whether the foreign investment would result in foreign companies' control of U.S. companies, whether the acquiring company is controlled by a foreign government, and whether there are associated national security risks. We analyzed these issues for a judgmentally selected sample of 16 cases that were reviewed by CFIUS in 1992 and 1993. Details on our objectives, scope, and methodology are

¹The Exon-Florio legislation was a provision of the Omnibus Trade and Competitiveness Act of 1988 and is part of the Defense Production Act of 1950, 50 U.S.C. app. 2170.

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presented in appendix I. Previous products on this subject are listed on the last page of the report.

Background

Preserving U.S. industrial capabilities in sectors critical to national security has been a traditional U.S. policy goal. An important concern in the debate on foreign investment in the United States is the possibility that key segments of industries critical to the national security could come under foreign control through foreign investments.² Because U.S. defense strategy relies on the deterrent effects of technological rather than numerical superiority, concern about foreign investment focuses on the U.S. government's ability to identify technologies crucial to defense systems and to act to preserve and promote U.S. leadership in them.

The United States does not screen inward investment but relies on certain laws or regulations to ensure that foreign investment does not assume forms harmful to the nation's interests. For example, specific restrictions are in place to protect classified defense information from foreign access and to ensure U.S. production of vital defense goods in the event of a crisis. Foreign investments in U.S. firms performing classified defense work are monitored under the National Industrial Security Program. Restrictions under this program provide authority to restrict or deny foreign access to classified information. Although they do not authorize denials of foreign investments, they can, in effect, deter potential investors who are seeking access to classified information. The U.S. government, in addition, restricts foreign investment in certain sectors, such as energy resources, coastal and domestic shipping, and air transport.

To counter the loss of leading-edge or highly advanced technology and processes that are important to the country's security through the acquisition of U.S. companies by foreign investors, Congress passed the Exon-Florio legislation in 1988. Congress was concerned that foreign takeovers of U.S. firms that harmed U.S. security could not be stopped unless the President declared a national emergency or regulators invoked Federal antitrust, environmental, or securities laws. The Exon-Florio legislation grants the President the authority to take appropriate action to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair the national security. To exercise this authority, the President must find that (1) credible evidence exists that the foreign interest might take action that threatens to impair national security

²Foreign investment refers to foreign direct investment; that is, investment resulting in foreign ownership or control of 10 percent or more equity interest in a U. S. business.

and (2) provisions of law, other than the International Emergency Economic Powers Act, do not provide adequate and appropriate authority to protect the national security. However, Congress did not intend for the legislation to raise obstacles to foreign investment.

The President designated CFIUS as responsible for reviewing transactions. CFIUS is an existing Committee comprised of representatives from 11 agencies or offices. The Secretary of the Treasury chairs the Committee and the Departments of State, Commerce, and Defense are among the agencies represented. The Defense Technology Security Administration coordinates the positions of various Department of Defense (DOD) components and provides the final DOD position for CFIUS reviews.

Notification to CFIUS of an acquisition is voluntary. However, it is in the interest of foreign investors to do so because CFIUS retains the right to review in the future any acquisition not notified to the Committee. The Exon-Florio regulations also permit a Committee member to submit a notice of a proposed or completed acquisition for a national security review.

The CFIUS review process serves both to protect national security and to minimize any potential adverse effect of the Exon-Florio legislation on foreign investment in the United States. CFIUS determination that there are no national security issues essentially eliminates the risk that the President will at a later time block the transaction or order a divestiture.³

Once it is notified, CFIUS has an initial 30-day review period to determine if the transaction involves foreign control and whether there are national security concerns that warrant further investigation. If CFIUS decides that there will be foreign control and that potentially serious national security concerns are present, the Committee initiates a 45-day investigation. It then submits a report and recommendation to the President. The President has 15 days to decide whether or not to take appropriate action. The President may exercise the authority conferred by the Exon-Florio legislation, however, only if there is credible evidence that a foreign controlling interest might threaten national security and that other legislation cannot provide adequate protection.

As shown in table 1, between October 1988 and December 1994, CFIUS received 918 voluntary notifications. Of these, 15 involved 45-day

³The Exon-Florio regulations allow CFIUS to reopen its consideration of a transaction if parties fail to provide material information or submit false or misleading information.

investigations with recommendations to the President. In 5 of the 15 investigations, the companies voluntarily withdrew their investment offers. Of the remaining 10 investigations, the President decided not to intervene in 9 transactions and ordered divestiture in 1 case involving a Chinese company's acquisition of a U.S. aircraft parts company.

Table 1: Disposition of CFIUS Notifications (Oct. 1988 Through Dec. 1994)

Year	CFIUS notifications	Notifications investigated	Notifications withdrawn	President blocked
1988	14	1	0	0
1989	200	5	2	1 ^a
1990	295	6	2	0
1991	152	1	0	0
1992	106	2	1 ^b	0
1993	82	0	0	0
1994	69	0	0	0
Total	918	15	5	1

Note: The decrease in CFIUS notifications somewhat parallels the decline in overall foreign direct investment in the United States.

^aIn this case, the President ordered China National Aero-Technology Import and Export Corporation, a People's Republic of China aerospace company, to divest from MAMCO, which involved a U.S. aircraft parts manufacturer.

^bThe investors withdrew their offer on the last day of the investigation of this case, which involved the acquisition of LTV Missiles Division by Thomson-CSF.

Source: CFIUS data as of January 1995.

In 1992, Thomson-CSF, a French government-owned company, attempted to acquire the LTV Corporation's Missile Division, which prompted legislation aimed at strengthening Exon-Florio.⁴ One provision made a distinction between foreign control and foreign government control and mandated 45-day investigations when the acquiring company is controlled by or acting on behalf of a foreign government and the acquisition could result in foreign government control that could affect the national security. Another provision required intelligence agency assessments of the risk of diversion of a defense critical technology when the U.S. company is engaged in the development of such a technology or is otherwise important to the defense industrial and technology base.

⁴See sections 837 and 838 of the Fiscal Year 1993 National Defense Authorization Act (P.L. 102-484), Oct. 23, 1992, which amended 50 U.S.C. app. 2170 and added 10 U.S.C. 2537, respectively.

Results in Brief

About two-thirds of the cases notified to CFIUS between October 1988 and May 1994 involved defense-related and high-technology industries that raised possible national security concerns. The remaining cases involved transactions in industry sectors such as construction, real estate, entertainment, and consumer products, which would be unlikely to raise national security concerns.

Many companies voluntarily notified CFIUS of proposed investments in and acquisitions of U.S. companies, but, according to two private sector data bases, many others did not. These data bases included foreign acquisitions of or investments in U.S. companies involved in aerospace, electronics, computers, and advanced materials. We do not know if there is any significance to be attached to the fact that not all foreign investments are notified. The CFIUS process was not intended to provide a comprehensive screening mechanism for all foreign investment although CFIUS officials expressed the view that, because CFIUS clearance essentially eliminates the risk of a forced divestiture, most transactions affecting national security are reported. However, after discussing these unnotified transactions with CFIUS officials, they advised us that other committee members will be reminded of their authority under the regulations to bring transactions to the committee's attention.

In deciding whether a foreign investment will result in a foreign company gaining control of a U.S. company, CFIUS considers many factors related to the investor's ability to affect key company decisions. CFIUS does not decide that a foreign company will gain control based solely on the company's percentage of ownership because a minority shareholder can exercise control under various circumstances.

When deciding on foreign government control, CFIUS examines the extent to which a foreign government owns and controls the acquiring company. Of the 174 transactions filed between the 1992 legislation and December 1994, CFIUS decided there was foreign government control in 18 cases. None of these cases were investigated since CFIUS decided the national security concerns were not sufficient to warrant further investigation.

The Exon-Florio legislation does not provide a precise definition of national security. It does identify certain factors to consider in deciding what constitutes a threat to national security, but neither the statute nor the implementing regulations contain guidelines for weighing the various factors considered in examining the national security risks of a

transaction. As a result, CFIUS agencies have significant flexibility in making such judgments. Agency officials noted that the threshold for determining a national security threat is high and that the Exon-Florio provision requires them to consider whether other laws provide adequate protection. CFIUS members noted that they rely primarily on DOD's assessment of national security risks. In evaluating those risks, DOD officials stated they consider several factors, including whether the company being acquired is a sole-source supplier to DOD, whether it has classified contracts, and whether the diversion of critical technologies is a risk.

The 1992 legislation requires DOD to direct appropriate defense intelligence and other agencies to assess the risk of diversion when DOD decides that a CFIUS case involves a company engaged in the development of a defense-critical technology or is otherwise important to the defense industrial and technology base. Of the 174 cases reviewed between October 1992 and December 1994, the Office of the Assistant Secretary of Defense for Economic Security found that 9 cases required a risk of diversion assessment.

Characteristics of Investments Reported and Not Reported to CFIUS

Our analysis of data on CFIUS cases from October 1988 through May 1994 showed that about two-thirds of the filings involved high-technology industries in which there could be potential national security concerns.⁵ Among these industries are computers and semiconductors, electronics, aerospace, advanced materials, chemicals, biotechnology, and telecommunications. About one-third of the notifications to CFIUS involved industries in which national security concerns would be unlikely to arise. Examples of these industries include mining, plastics and rubber, construction, retailing, real estate, and entertainment. (App. III contains additional information on the industries with foreign investments that were reported to CFIUS.)

Companies from Japan, the United Kingdom, France, and Germany accounted for over 65 percent of the notifications to CFIUS since 1988. Japanese companies were the leading investors notifying CFIUS, primarily on investments in computers and semiconductors. British companies were the second most active investors filing with CFIUS, most frequently on investments in advanced materials and electronics. French companies most frequently notified CFIUS of investments in aerospace, computers, and

⁵We used a Commerce Department database maintained on CFIUS cases and other sources to develop high-technology and low-technology industry categories. We also consulted with government and private sector experts to develop these categories.

telecommunications companies, while German companies filed with CFIUS for investments in chemicals, industrial controls, equipment and machinery, and energy industries. Our comparison of CFIUS data with two private sector databases on foreign investments showed somewhat comparable investment concentrations by country and by industry. (Details on the four countries' CFIUS filings by industry are in app. IV.)

The 1992 legislation required the President to report on various aspects of foreign investment in U.S. critical-technology companies. The National Economic Council formed a working group to respond to the requirement and reported its findings in 1994. The group found no credible evidence that a country or private companies had a coordinated strategy to acquire U.S. critical-technology companies. It also noted that the absence of credible evidence demonstrating a coordinated strategy should not be viewed as conclusive proof that a coordinated strategy does not exist. The report also indicated that foreign governments, including those of France, Germany, and Japan, provide indirect assistance and guidance to their companies regarding foreign investments in high-technology U.S. firms.

Investments Not Reported to CFIUS

The Exon-Florio legislation and implementing regulations do not define which investments are important to review for national security reasons. Moreover, notification to CFIUS is voluntary. CFIUS officials believe that the Committee has been notified of most foreign investments in key or high-technology companies that could affect national security. CFIUS officials pointed out that investors have a strong inducement to notify CFIUS and seek its prior approval because the President retains the authority to order divestitures of transactions not cleared by CFIUS. However, we found that many foreign investments occur in high-technology or defense-related industries that were not reported to CFIUS. While the significance of the gap is unclear, it does suggest that the CFIUS process alone cannot be relied on to surface transactions posing potential national security concerns.⁶

Our comparison of two private databases on foreign investment in the United States with CFIUS data showed that many transactions occurred in high-technology industries that were not filed with CFIUS. Among these industries were telecommunications, advanced materials, biotechnology, electronics, computers, and aerospace. We verified selected transactions and determined that an acquisition of a U.S. aircraft parts manufacturer

⁶The U.S. government has other mechanisms to safeguard national security, such as export control laws and industrial security regulations that protect classified facilities.

and investments in biotechnology and chemical companies occurred without being reported to CFIUS. However, these databases do not contain sufficient information to establish a link to national security, since they do not contain information on, for example, whether the acquired company had DOD contracts or produced products subject to U.S. export controls. (See app. I for an explanation of our comparison and app. II for details on transactions not notified to CFIUS, according to these private databases.) Furthermore, because Exon-Florio was never intended to be a comprehensive foreign investment review act, it is to be expected that there would be foreign investments that are not notified to CFIUS.

CFIUS Decisions on Foreign Companies' Control and Foreign Governments' Control Over Acquiring Companies

Under the Exon-Florio legislation, CFIUS has considerable flexibility to decide if a transaction results in foreign company control over a U.S. firm or if a foreign government has control over an acquiring company. The implementing regulations do not specify that a given percentage of foreign ownership automatically results in control because minority owners can exercise control under various conditions. For example, a minority owner might hold board membership and have special voting rights over certain company actions. For this reason, the regulations broadly define control to mean having the power to directly or indirectly effect key company decisions and actions. CFIUS generally relies on a company's stated intentions regarding the structure of the investment and the decision-making framework of the corporation. While decisions about foreign control are straightforward in complete acquisitions and majority investments, such decisions can be complicated and difficult in minority investment cases. Also, deciding foreign government control over the acquiring company can be difficult and involves a high degree of judgment.

Decisions on Foreign Control

Of the 16 cases we reviewed, 12 involved majority investments or 100 percent acquisitions, and 4 involved minority investments. In two of the minority investment cases, CFIUS found foreign control and in two cases it determined there was no foreign control.

- A British company notified CFIUS of its intention to acquire 20 percent of a U.S. company. The U.S. company had classified contracts and provided a critical U.S. government emergency service. The acquisition would give the British company 3 of the 15 seats on the company's board of directors and certain "consent rights" that would enable the British company to block several corporate actions. CFIUS found that foreign control would result on the basis of the British company's right to veto certain

acquisitions, joint ventures, and asset sales as well as any company charter amendment adversely affecting the British company. CFIUS conducted a 30-day review. However, this review determined that national security concerns were not sufficient to warrant an investigation.

- A German company notified CFIUS of its intention to purchase 12.25 percent of the common stock of a U.S. company. The U.S. parent company controlled 51 percent of the stock, and three European companies controlled the remaining 49 percent. The proposed investment would redistribute the stock among the foreign owners, leaving the U.S. majority ownership intact. The U.S. company had classified DOD and other U.S. government contracts that were protected by facility security clearances.⁷ CFIUS determined that the purchase of 12.25 percent of the company's voting stock constituted foreign control because of several minority veto rights. These rights included the ability of any single foreign director to block decisions such as the adoption of a strategic plan or annual budget or the development of a new product that varies from the types of business stated in the strategic plan. CFIUS reviewed the company's notification for national security concerns and decided to proceed with a 45-day investigation. During the investigation, CFIUS addressed issues relating to DOD's ability to mitigate foreign control and influence over the company under the existing security agreement. As required, CFIUS prepared a report to the President. The transaction was not blocked.
- A Singaporean company proposed acquiring 22.8 percent of the voting stock in an investor group formed to acquire all of a U.S. company. A majority of the investor group's voting stock was held by U.S. entities. The Singaporean company was indirectly owned by a holding company that was 99.9 percent owned by the Singapore Ministry of Finance. The U.S. company had classified contracts with DOD, necessitating a security agreement protecting classified information and technologies. CFIUS based its finding that the foreign company would not have control partly on the minority investor's willingness to execute a proxy agreement under industrial security regulations that would give the minority investor's voting rights to two U.S. citizens.⁸ (The minority foreign investor later

⁷The industrial security regulations require a company to obtain a security clearance when working on DOD classified contracts and prescribe procedures for defense companies to protect classified information. A defense company under foreign ownership or control can be eligible for a security clearance if it takes action to effectively negate or reduce the risk posed by foreign ownership or control. See Defense Industrial Security: Weaknesses in DOD Security Arrangements at Foreign-Owned Defense Contractors (GAO/NSIAD-96-64, forthcoming).

⁸The proxy agreement was referenced in a letter to the company notifying it of CFIUS's finding of no foreign control and explaining the basis for this determination. The letter also referred to correspondence in which the company explains the proxy agreement it planned to enter into in response to DOD industrial security regulations.

entered into a security agreement that would allow the foreign investor to gain board membership.) In our discussions on this case, CFIUS officials agreed that a proposed security agreement should not be used to determine foreign control. The Exxon-Florio control standards are not comparable to the control issues under the industrial security regulations, which intend to isolate foreign control and influence over certain aspects of the business, not to determine whether the entire company will become foreign controlled. Although CFIUS's letter to the company notifying it of its decision referenced the proxy agreement, CFIUS officials stated the finding of no foreign control was based on other factors, including a requirement for a two-thirds stockholder majority for certain decisions. Because CFIUS found no foreign control, it did not review the transaction for national security concerns.

- Two Israeli companies acquired a total of 35.6 percent of the outstanding stock of a U.S. company. One of the Israeli companies increased its ownership from 10.5 percent of the outstanding stock to 17.4 percent, while the second company acquired 18.2 percent of the outstanding stock. The notification to CFIUS stated that the two companies were considering entering into a shareholders' agreement to vote their respective shares in concert. In subsequent correspondence, CFIUS was informed that the two Israeli companies had not concluded a shareholders' agreement. CFIUS found that there was no foreign control because the two firms were not acting together and did not either individually or collectively have the ability to control the U.S. company. Because CFIUS found no foreign control, it did not review the transaction for national security concerns.

Decisions on Foreign Government Control

The 1992 legislation required mandatory investigations of CFIUS cases in which the foreign company proposing an investment is controlled by a foreign government and the transaction could result in foreign control that "could affect the national security." As a result, CFIUS also reviews cases for foreign government control. Of the 174 cases reviewed between October 1992 and December 1994, CFIUS found foreign government control in 18 cases. None of these cases resulted in investigations. CFIUS found the national security concerns in these cases were not sufficient to warrant investigations. In implementing the legislative requirement, CFIUS has determined that even when there is foreign government control, the provision does not mandate an investigation for a notification that does not pose a credible threat to the national security.

Of the 16 cases we reviewed, 13 occurred after the 1992 legislation. Six cases involved some level of foreign government ownership of or

participation in the acquiring companies. In two of these cases, CFIUS determined there was foreign government control.

- A subsidiary of a German company proposed acquiring a U.S. manufacturer of large machine tools. The U.S. company had unclassified contracts with DOD, and its products were subject to export controls applying to dual-use products, but it did not possess unique capabilities, and its technology was not considered defense critical. About one-third of the German company was indirectly owned by one German state government and two German city governments. Under German law, this level of ownership gave the government-owned entities the power to block certain decisions, such as the acquisition or closing down of businesses. The government-owned entities offered to abstain on shareholder decisions affecting the U.S. company. CFIUS found that there was foreign control because the acquiring company was German-owned and planned to purchase substantially all the assets of the U.S. company. Because the government entities had the power to block certain decisions, CFIUS determined there was foreign government control. CFIUS also concluded that there were not sufficient national security concerns to warrant an investigation.
- A subsidiary of a French company proposed purchasing a U.S. developer and manufacturer of software tools. The U.S. company had unclassified contracts with DOD and other U.S. government entities, but the technology was not militarily sensitive. The ultimate parent of the acquiring company is 100 percent owned by the French government. CFIUS determined that the acquiring company was foreign owned and that the outright acquisition of the U.S. company would result in foreign control. Because the buyer was owned by the French government, CFIUS decided that foreign government control would result from this acquisition. CFIUS also concluded that there were not sufficient national security concerns to warrant an investigation.

In the other four cases, CFIUS determined that there was no foreign government control. Two of these cases are discussed below for illustrative purposes. In the other two cases, CFIUS decided there was no foreign government control because either multiple intervening layers of ownership diluted government control or the foreign government could not appoint board members.

- A South Korean company notified CFIUS of its intent to acquire a U.S. designer and manufacturer of semiconductor devices. The U.S. company was a defense subcontractor engaged in a defense-critical but not state-of-the-art technology. The foreign buyer indicated its intention to

transfer the U.S. company's technology to Korea and establish a production facility there. The foreign buyer received a small proportion of its total assets from two banks owned by the Korean government. Because this was a 100-percent acquisition by a Korean-owned company, CFIUS made a determination of foreign control. Although the foreign buyer had financing arrangements with the government-owned banks, CFIUS determined the amount of capital provided was not sufficient to constitute foreign government control. CFIUS also determined that there were not sufficient national security concerns to warrant a 45-day investigation.

- A British company notified CFIUS of its intention to acquire 20 percent of a U.S. company. The U.S. company had classified contracts and provided a critical U.S. government emergency service. Although the British government owned only 1.5 percent of the acquiring company's issued shares, it retained special powers over the acquiring company. These powers included requiring the government shareholder's written consent to alter certain sections of the foreign buyer's articles of incorporation. For example, consent must be obtained when there are changes in the limit of any single shareholder owning more than 15 percent. The British government could also appoint two directors. As discussed on page 8, CFIUS determined that the minority investment would result in foreign control. CFIUS decided that there was no foreign government control because the government owned only a small amount of stock, had not recently appointed directors to the board, and had no significant consent rights over the acquiring company. CFIUS conducted a 30-day review and determined that there were not sufficient national security concerns to warrant a 45-day investigation.

DOD's Reviews of CFIUS Cases for National Security Risks

DOD has no special statutory role in reviewing transactions for national security concerns, and all other CFIUS members have equal standing to raise such concerns. However, officials from other CFIUS agencies stated that they look to DOD to make key judgments regarding the national security risks of a transaction. DOD considers, among numerous factors, whether (1) the technologies and products involved are critical to the national security, (2) the firm being acquired is a sole-source supplier to DOD, and (3) the U.S. company has classified contracts with the U.S. government. In addition, DOD reviews and analyzes information from the intelligence community regarding the foreign buyer's past record of compliance with export controls, proliferation of sensitive weapons-related technologies, and other matters.⁹

⁹The other CFIUS participants also receive and consider intelligence information in their deliberations.

Our sample included some cases involving intelligence information on the acquiring company or its government's practices, including violations of U.N. sanctions and transfers of U.S. technology to proscribed countries; for most of these cases, DOD did not recommend a 45-day investigation. According to Defense Technology Security Administration officials, this information alone did not provide sufficient grounds to warrant investigations. They said that in some cases the technology at the U.S. company was not deemed to be critical and in others the intelligence information was not sufficiently corroborated, did not show violations of U.S. laws, or had occurred so long ago that it was no longer relevant.

DOD Determinations of Defense-Critical Technologies for Risk of Diversion Assessments

As required by the 1992 legislation, DOD agencies, including defense intelligence entities, assess the risk of diversion when the Secretary of Defense determines that a proposed merger, acquisition, or takeover may involve a firm engaged in the development of a defense-critical technology or is otherwise important to the defense industrial and technology base. These assessments are to be shared with all the Committee members, according to CFIUS officials. The Office of the Assistant Secretary of Defense for Economic Security found that 9 of the 174 CFIUS cases reviewed between October 1992 and December 1994 required a risk of diversion assessment. The responsible DOD official noted that the legislation requires a risk of diversion assessment only when the company is involved in the development, not the application, of a critical technology or is otherwise important to the defense industrial base. DOD uses the Key Technologies Plan, as authorized by the legislation, to decide whether the company is developing a defense-critical technology.

Agency Comments

The Departments of Defense, State, and the Treasury generally agreed with our draft report and provided minor technical comments. The Department of Defense said it concurred with the report as presented. The Department of State, in official oral comments, said that the report fairly and thoroughly describes the activities of CFIUS and accurately reflects the role of CFIUS members. The Department of the Treasury discussed the voluntary nature of CFIUS notification and said it will remind agencies to bring to CFIUS's attention transactions in high-technology industries that have not been notified to CFIUS. Treasury also stated that it believes Exon-Florio implementation "has increased the awareness of investors to national security issues, brought transactions into conformity with existing laws where needed, and caused investors to consider explicitly national security when putting together proposals to acquire U.S.

businesses." The full text of the comments from the Departments of the Treasury and Defense are included in appendixes V and VI, respectively.

The Department of Commerce reviewed the final draft and provided minor technical comments. The Department of Justice also reviewed the report but did not comment.

We are sending copies of this report to other congressional committees; the Secretaries of the Treasury, State, Defense, Commerce, and Justice; and the Director, Office of Management and Budget. We are also making copies available to other interested parties upon request.

Please contact me at (202) 512-4125 if you or your staff have any questions concerning this report. Major contributors to this report are listed in appendix VII.

A handwritten signature in black ink, reading "David E. Cooper". The signature is fluid and cursive, with the first name "David" being the most prominent.

David E. Cooper
Director, Acquisition Policy,
Technology, and Competitiveness Issues

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Abbreviations

CFIUS	Committee on Foreign Investment in the United States
DOD	Department of Defense
ESI	Economic Strategy Institute
SDC	Securities Data Company

Objectives, Scope, and Methodology

Our examination of the implementation of Exon-Florio legislation and its amendments was requested by the former Chairs of the Subcommittee on Legislation and National Security and the Subcommittee on Commerce, Consumer, and Monetary Affairs, House Committee on Government Operations, and the Chairs and Ranking Minority Members of the Subcommittee on Research and Technology and the Subcommittee on Oversight and Investigation, House Committee on Armed Services. Specifically, we focused on (1) the extent foreign investments are reported to the Committee on Foreign Investment in the United States (CFIUS) and the characteristics of these investments and (2) the factors CFIUS considers in making decisions on whether the foreign investment would result in foreign companies' control of U.S. companies, whether the acquiring foreign company is controlled by a foreign government, and whether there are associated national security risks.

To address these objectives, we interviewed officials and examined records at the Departments of Defense (DOD), the Treasury, State, and Commerce. We also discussed CFIUS procedures and selected foreign company notifications with officials from the Defense Technology Security Administration and other DOD participants, including the Office of the Under Secretary of Defense for Acquisition and Technology; the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence; the military services; the Defense Intelligence Agency; the National Security Agency; the Defense Investigative Service; the Defense Logistics Agency; and the Advanced Research Projects Agency. We also obtained information from other CFIUS participants, including the Department of Justice, and contacted the Council of Economic Advisers, the Office of Management and Budget, the Office of Science and Technology Policy, and the National Security Council.

To examine the scope of foreign investments voluntarily filed with CFIUS, we used an unofficial Department of Commerce database on CFIUS cases maintained by the Office of Strategic Industries and Economic Security.¹ We also compared the CFIUS data with foreign investment databases maintained by the Economic Strategy Institute (ESI) and Securities Data Company (SDC). The ESI database tracks foreign investments in and acquisitions of U.S. companies involved in high, key, or critical technologies. These technology categories are developed by consultation with technical experts and generally follow broad standard technology categories. The SDC tracks investments, acquisitions, and mergers

¹CFIUS does not maintain an official database on its cases.

worldwide, but we obtained selected data on foreign investment in the United States in technology areas comparable to those tracked by ESI. SDC categorizes the technology sector by ascertaining the primary business of each company and by identifying pertinent standard industrial classification codes. From this comparison of the databases, we identified transactions not reviewed by CFIUS. We further selected transactions involving foreign acquisitions of or majority investments in high-technology industries and verified that these transactions were completed without CFIUS review for foreign control and national security concerns.

We eliminated duplications in the Commerce database and deleted notifications withdrawn from CFIUS review. To develop industry categories, we relied primarily on those used by Commerce but also considered ESI's categories. We divided the U.S. industries listed in the database into two categories, high technology and low technology, by referring to DOD's Key Technologies Plan and the Militarily Critical Technologies List. We consulted with experts within and outside the government on our industry groupings and made changes in response to their recommendations.

To evaluate the overall concentration or frequency of foreign investments by country and industry, we obtained data from federal government reports and interviewed agency officials at Commerce's Bureau of Economic Analysis about aspects of their data collection efforts. We also obtained information from several private sector firms tracking foreign investment in U.S. companies, including SDC, Ulmer Brothers, Inc., and Technology Strategic Planning, Inc. We did not independently verify the information in the Commerce, ESI, or SDC databases.

To examine the factors CFIUS considers in its decision-making process, we selected a judgmental sample of notifications from 1992 and 1993. We used the Defense Intelligence Agency's list of 188 CFIUS filings for these years to select 33 notifications that the agency ranked high, moderate, and low risk. After an initial examination, we focused on 16 cases for in-depth review on the basis of the following criteria: (1) the technologies and industries involved, including cases DOD found to involve critical technologies; (2) the countries and companies involved in the transactions, including foreign government-owned companies; (3) whether validated export licenses are required; (4) the risk and intelligence analyses done; (5) the presence of DOD classified contracts and associated security agreements; and (6) the presence of sole-source or last supplier

Appendix I
Objectives, Scope, and Methodology

considerations. The 16 cases we reviewed covered 8 foreign countries and 6 industrial sectors. Table I.1 shows the 16 cases we selected for review.

Appendix I
Objectives, Scope, and Methodology

Appendix I
Objectives, Scope, and Methodology

**Table I.1: Sixteen Selected CFIUS
Notifications in 1992-93**

CFIUS file number	Foreign country	Foreign government owner/control	State munitions licenses	Commerce export licenses
92-022	United Kingdom	N/A ^a	Yes	No
92-027	France	N/A ^a	Yes	No
92-057	Germany	N/A ^a	Yes	No
92-087	France	Yes	No	No
92-105	Japan	No	No	Yes
93-004	Israel	No	Yes	Yes
93-013	South Korea	No	No	Yes
93-014	France	No	No	Yes
93-038	Germany	Yes	No	Yes
93-054	Israel	No	No	Yes
93-059	Singapore	No	Yes	Yes
93-060	France	No	Yes	Yes
93-064	Israel	No	No	Yes
93-065	France	No	No	Yes
93-069	Hong Kong	No	Yes	Yes
93-078	United Kingdom	No	No	Yes

**Appendix I
Objectives, Scope, and Methodology**

Classified contracts	Percent acquired	Risk of diversion	Case withdrawn	Investigated	Technology
Yes	100.0	N/A	No	No	Electronics
Yes	100.0	N/A	Yes	Yes	Aerospace
Yes	12.0	N/A	No	Yes	Aerospace
No	100.0	No	No	No	Computers
No	100.0	No	No	No	Computers
No	100.0	No	No	No	Aerospace
No	100.0	Yes	No	No	Electronics-telecommunications
No	51.0	No	No	No	Telecommunications
No	100.0	No	No	No	Machine tools
No	17.4 ^b 18.2	No	Yes ^c	No	Electronics
Yes	23.0	No	Yes ^c	No	Electronics
No	100.0	No	No	No	Telecommunications-electronics
No	100.0	Yes	No	No	Telecommunications
No	100.0	No	No	No	Aerospace
Yes	100.0	Yes	Yes ^c	No	Advanced materials
Yes	20.0	Yes	No	No	^d

^aThese cases were reported before the October 1992 legislation requiring (1) investigations of cases involving foreign government control that could affect the national security and (2) intelligence assessments of diversion risk in cases involving defense-critical technologies.

^bRepresents two investors.

^cNotifications were determined to involve no foreign control and therefore did not come under Exon-Florio jurisdiction.

^dTechnology information is not included to avoid revealing the transaction.

The sampling is not statistically representative of the entire CFIUS caseload, but these cases illustrate the CFIUS process and allowed us to examine the more difficult cases (that is, those involving minority investments, foreign government ownership and control, critical defense technologies, and/or adverse intelligence information).

We reviewed records for each of the 16 cases at the Departments of the Treasury, Defense, State, and Commerce because CFIUS does not maintain a central file repository. DOD and State screened their CFIUS files and documents before making them available to us, which may have impeded

our scope. The Defense Intelligence Agency and Central Intelligence Agency also provided information on our sample cases, where applicable.

We reviewed the Exon-Florio legislation and subsequent amendments, implementing regulations, and the legislative history. We considered DOD's role in the legislation and focused on the implementation of recently related legislation.

We performed our work between March 1994 and April 1995 in accordance with generally accepted government auditing standards.

Foreign Investment Transactions Not Reported to CFIUS

Tables II.1 and II.2 provide information on foreign investment transactions from two private databases that were not in the Commerce Department's database on CFIUS notifications. In our tables, we include only those transactions involving high-technology industries.

Appendix II
Foreign Investment Transactions Not
Reported to CFIUS

**Table II.1: Data From the Economic
Strategy Institute on Transactions Not
Reported to CFIUS (Oct. 1988 through
May 1994)**

High-technology industry	Japan	United Kingdom	France	Germany
Computers	93	18	7	2
Semiconductor equipment	27	1	1	1
Semiconductors	39	2	0	1
Electronics	35	11	2	1
Aerospace	11	3	1	1
Advanced materials	23	4	0	3
Chemicals	19	5	9	6
Biotechnology	24	9	3	11
Telecommunications and information	29	7	2	3
Machine tools	9	2	0	0
Environmental technologies	1	0	1	0
Robotics	3	0	0	0
Miscellaneous	25	6	2	0
Total	338	68	28	29

Appendix II
Foreign Investment Transactions Not
Reported to CFIUS

Canada	Switzerland	Taiwan	Australia	Finland	South Korea	Other countries	Total
7	2	10	1	0	5	11	156
0	3	0	1	0	0	0	34
1	0	1	0	0	1	1	46
1	1	0	1	0	2	10	64
4	1	0	0	0	0	1	22
0	0	0	1	0	0	2	33
3	1	0	0	0	0	5	48
0	8	0	1	0	0	9	65
4	2	1	2	0	1	5	56
1	0	0	0	0	0	2	14
0	0	0	0	0	0	0	2
0	1	0	0	0	0	0	4
0	0	0	0	0	0	1	34
21	19	12	7	0	9	47	578

Appendix II
Foreign Investment Transactions Not
Reported to CFIUS

**Table II.2: Data From the Securities
 Data Company on Transactions Not
 Reported to CFIUS (Oct. 1988 through
 May 1994)**

High-technology industry	Japan	United Kingdom	France	Germany
Biotechnology	29	30	5	7
Computers	62	27	4	1
Semiconductors	22	3	0	1
Electronics	19	26	2	4
Telecommunications	11	9	3	1
Advanced materials	5	2	1	0
Lasers	6	3	0	0
Robotics	3	2	0	1
Other	2	5	1	0
Total	159	107	16	15

Appendix II
Foreign Investment Transactions Not
Reported to CFIUS

Canada	Switzerland	Taiwan	Australia	Finland	South Korea	Other countries	Total
10	9	0	4	1	0	47	142
27	6	8	4	0	3	58	200
1	0	2	0	0	1	6	36
4	3	0	2	0	1	17	78
6	1	1	1	0	1	14	48
0	1	0	0	1	0	3	13
0	0	0	0	0	0	1	10
0	0	0	0	0	0	2	8
2	0	0	0	0	0	4	14
50	20	11	11	2	6	152	549

CFIUS Cases Reviewed for National Security Concerns

From the Commerce Department's database on CFIUS cases, we obtained data on cases reviewed for national security concerns between October 1988 through May 1994. Table III.1 shows the number of CFIUS cases reviewed during that period, by country, in high-technology and non-high-technology industry categories. Table III.2 provides further details of CFIUS cases reviewed for national security concerns by high-technology industry category and by country. Table III.3 illustrates CFIUS cases in non-high-technology industries by country. We developed these industry categories using the Commerce Department's groupings and by consulting with industry experts within and outside the U.S. government.

Table III.1: CFIUS Cases Involving All Industries Reviewed for National Security Concerns (Oct. 1988 through May 1994)

Country	High-technology cases	Non-high-technology cases	Total
Japan	134	73	207
United Kingdom	131	53	184
France	62	25	87
Germany	41	18	59
Netherlands	20	21	41
Switzerland	25	9	34
Canada	20	10	30
Sweden	15	5	20
Taiwan	14	0	14
Australia	9	5	14
Finland	9	5	14
Italy	4	8	12
Belgium	7	5	12
South Korea	8	2	10
Norway	7	3	10
Singapore	8	0	8
Israel	5	2	7
South Africa	4	1	5
China	4	1	5
India	3	1	4
Austria	3	1	4
Venezuela	3	0	3
Mexico	0	3	3
Liechtenstein	3	0	3
Kuwait	2	1	3
Bermuda	2	1	3

(continued)

Appendix III
CFIUS Cases Reviewed for National
Security Concerns

Country	High-technology cases	Non-high-technology cases	Total
Spain	2	0	2
Soviet Union	1	1	2
Panama	2	0	2
Luxembourg	0	2	2
United Arab Emirates	1	0	1
Thailand	1	0	1
Saudi Arabia	1	0	1
New Zealand	1	0	1
Malaysia	1	0	1
Ireland	1	0	1
Indonesia	0	1	1
Hong Kong	0	1	1
Greece	1	0	1
Denmark	1	0	1
British Virgin Islands	0	1	1
British West Indies	0	1	1
Brazil	0	1	1
Total	556	261	817

Appendix III
CFIUS Cases Reviewed for National
Security Concerns

**Table III.2: CFIUS Cases Involving
High-Technology Industries Reviewed
for National Security Concerns (Oct.
1988 through May 1994)**

High-technology industry	Japan	United Kingdom	France	Germany
Computers	30	12	9	0
Energy	4	9	6	5
Semiconductors	32	3	5	3
Electronics	12	17	3	4
Aerospace	7	15	11	2
Industrial controls, equipment, instruments, and machinery	6	13	7	6
Advanced materials	7	21	2	3
Chemicals	7	12	1	7
Biotechnology, medical, and pharmaceutical	7	4	2	3
Telecommunications and information	6	5	8	1
Electrical equipment	6	4	3	4
General components	3	5	1	3
Optics	2	6	1	0
Coatings and adhesives	2	3	1	0
Analytical instruments	1	2	0	0
Environmental technologies	0	0	1	0
Robotics	1	0	0	0
Specialty gases	1	0	0	0
Micro-machines	0	0	0	0
Submersibles	0	0	1	0
Total	134	131	62	41

Appendix III
CFIUS Cases Reviewed for National
Security Concerns

Canada	Switzerland	Taiwan	Australia	Finland	South Korea	Other countries	Number of cases
3	4	3	0	1	4	11	77
6	3	2	2	1	0	17	55
0	0	4	0	0	2	4	53
0	1	3	1	1	0	7	49
2	3	1	0	0	0	8	49
0	2	0	1	2	1	11	49
1	1	1	1	2	0	5	44
0	0	0	1	1	0	8	37
0	5	0	0	0	0	15	36
5	1	0	0	0	0	8	34
1	1	0	0	1	0	1	21
1	0	0	1	0	1	3	18
0	3	0	0	0	0	4	16
0	1	0	2	0	0	0	9
0	0	0	0	0	0	0	3
0	0	0	0	0	0	1	2
0	0	0	0	0	0	0	1
0	0	0	0	0	0	0	1
1	0	0	0	0	0	0	1
0	0	0	0	0	0	0	1
20	25	14	9	9	8	103	556

Appendix III
CFIUS Cases Reviewed for National
Security Concerns

**Table III.3: CFIUS Cases Involving
Non-High-Technology Industries
Reviewed for National Security
Concerns (Oct. 1988 through
May 1994)**

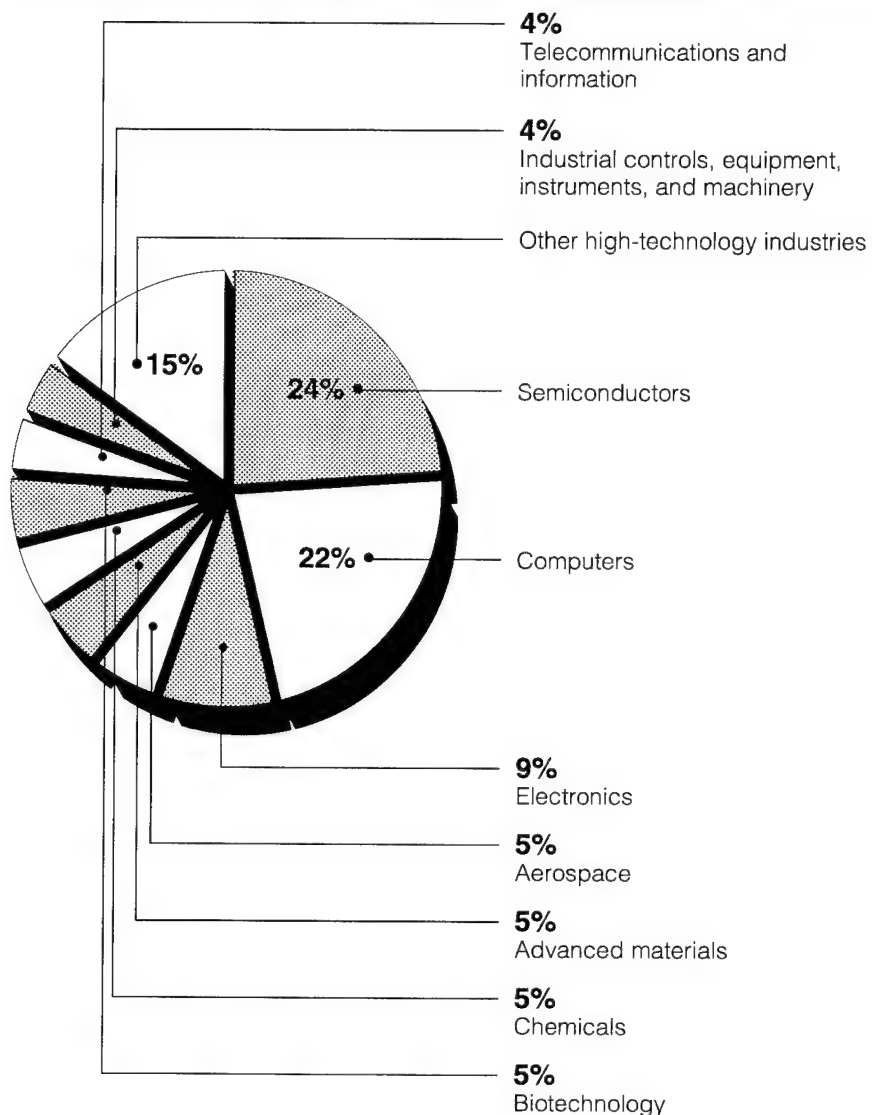
Non-high-technology industry	Japan	United Kingdom	France	Germany
Mining, metals, and metal-working equipment	18	19	12	8
Plastics and rubber	5	3	2	1
Construction and construction material	9	4	2	0
Automotive	5	4	0	2
Transportation services	3	1	0	1
Engineering services	2	4	0	1
Financial	7	0	0	0
Printing and publishing	1	2	0	1
Food, beverage, and tobacco	4	2	2	0
Consumer products	2	3	0	0
Environmental services	0	4	0	2
Real estate	6	0	0	0
Entertainment	6	0	0	0
Retailing	2	2	1	0
Information services	0	0	1	1
Consulting	0	1	2	0
Textiles	2	0	0	0
Small arms	0	1	1	1
Educational services	0	1	0	0
Wood products	0	1	0	0
Cans and containers	0	0	1	0
Photographic	1	1	0	0
Parts fabrication	0	0	1	0
Total	73	53	25	18

Appendix III
CFIUS Cases Reviewed for National
Security Concerns

Canada	Switzerland	Taiwan	Australia	Finland	South Korea	Other countries	Number of cases
2	1	0	1	1	1	10	73
0	1	0	0	1	0	13	26
2	1	0	1	0	1	6	26
2	0	0	0	0	0	6	19
1	1	0	0	0	0	4	11
0	0	0	0	1	0	2	10
0	0	0	1	0	0	10	18
0	1	0	2	0	0	3	10
0	0	0	0	0	0	1	9
2	1	0	0	0	0	0	8
0	1	0	0	0	0	0	7
0	0	0	0	1	0	0	7
0	0	0	0	0	0	0	6
0	0	0	0	0	0	1	6
1	1	0	0	0	0	1	5
0	0	0	0	0	0	1	4
0	1	0	0	0	0	1	4
0	0	0	0	0	0	0	3
0	0	0	0	0	0	1	2
0	0	0	0	1	0	0	2
0	0	0	0	0	0	1	2
0	0	0	0	0	0	0	2
0	0	0	0	0	0	0	1
10	9	0	5	5	2	61	261

CFIUS Filings From Japan, the United Kingdom, France, and Germany

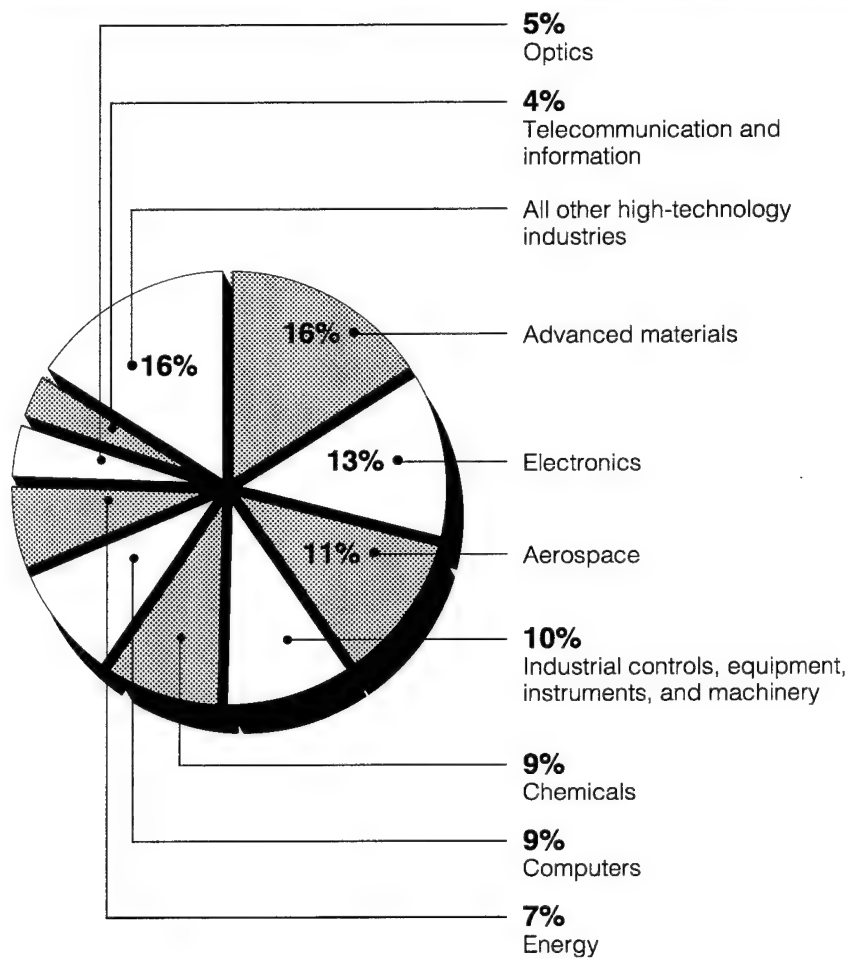
Figure IV.1: CFIUS Cases Involving Japanese Companies Investing in High-Technology Industries (Oct. 1988 through May 1994)



Note: Total does not equal 100 percent due to rounding.

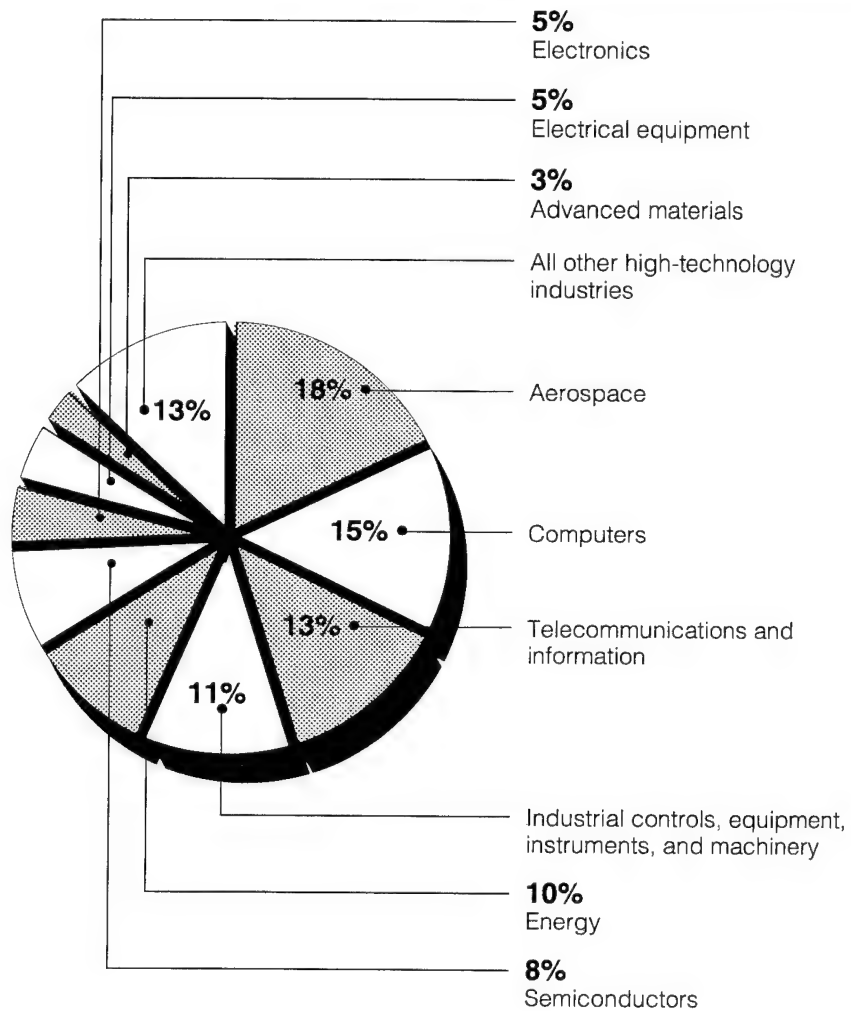
Appendix IV
CFIUS Filings From Japan, the United
Kingdom, France, and Germany

**Figure IV.2: CFIUS Cases Involving
British Companies Investing in
High-Technology Industries** (Oct. 1988
through May 1994)



Appendix IV
CFIUS Filings From Japan, the United
Kingdom, France, and Germany

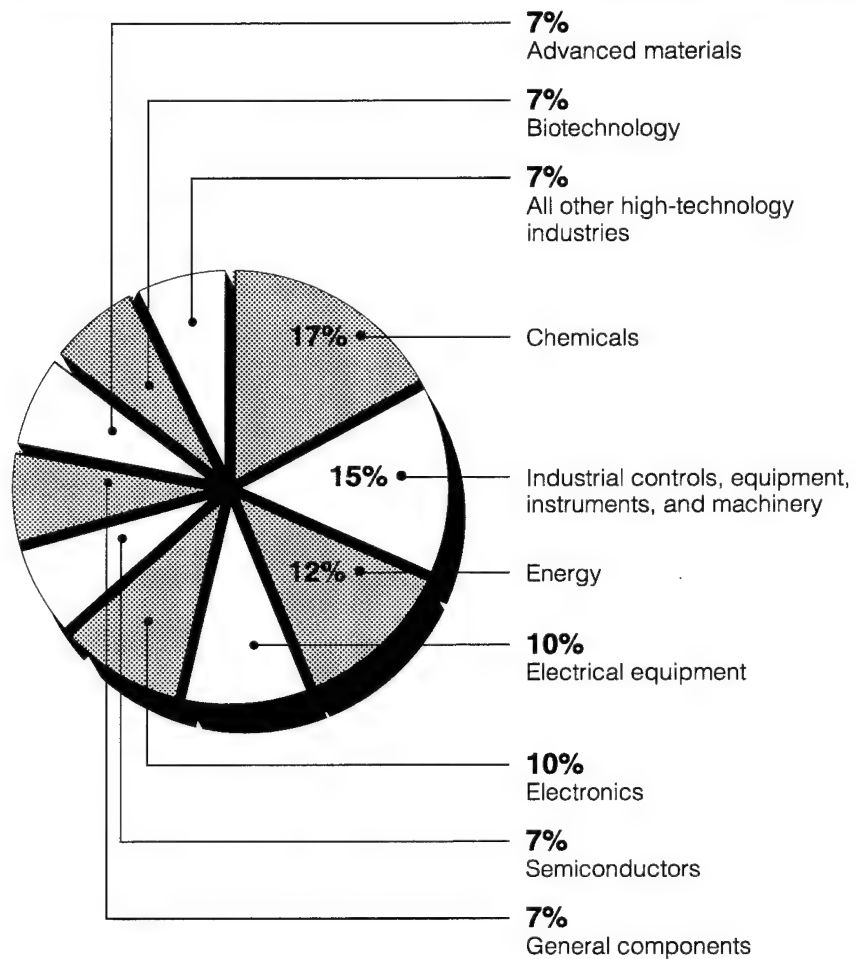
Figure IV.3: CFIUS Cases Involving
French Companies Investing in
High-Technology Industries (Oct. 1988
through May 1994)



Note: Total does not equal 100 percent due to rounding.

Appendix IV
CFIUS Filings From Japan, the United
Kingdom, France, and Germany

Figure IV.4: CFIUS Cases Involving
German Companies Investing in
High-Technology Industries (Oct. 1988
through May 1994)



Note: Total does not equal 100 percent due to rounding.

Comments From the Department of the Treasury



ASSISTANT SECRETARY

DEPARTMENT OF THE TREASURY
WASHINGTON
September 18, 1995

Mr. David E. Cooper
Director, Acquisition Policy, Technology
and Competitiveness Issues
National Security and
International Affairs Division
United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Cooper:

Your recent letter to the Secretary requesting comments on the GAO draft report, "Foreign Investment - Implementation of Exon-Florio and Related Amendments", has been referred to me for reply.

I read the report with interest and found it generally to be an accurate account of the activities of the Committee on Foreign Investment in the United States (CFIUS) as it relates to the implementation of the Exon-Florio provision. I offer the following comments to further clarify some of the issues raised in the report.

As highlighted in the report, Exon-Florio notifications are voluntary. Consequently, many foreign acquisitions will not be notified to CFIUS. This is by design. A voluntary system has the benefit of not unduly burdening foreign and domestic parties to transactions. But, it carries the risk that CFIUS will not learn of some transactions.

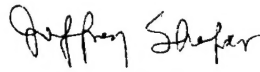
While notices are voluntary, there are safeguards that maximize the likelihood that a transaction with national security implications will be subject to Exon-Florio review. CFIUS regularly receives information from government experts on foreign acquisitions in their area of expertise. Transactions not notified by the parties can be notified by a CFIUS agency according to the Exon-Florio regulations (31 CFR Part 800.401(b)). Also, transactions not notified by the parties or an agency can become subject to consideration at such time as CFIUS learns of the transaction since the President retains indefinitely the power to prohibit non-notified transactions. In this regard, we will remind agencies to bring to CFIUS's attention transactions in high-technology industries that have not been notified to CFIUS.

On balance, we believe the implementation of the Exon-Florio provision by CFIUS has had the effect of protecting national security without compromising U.S. open investment policy. It

Appendix V
Comments From the Department of the
Treasury

has increased the awareness of investors to national security issues, brought transactions into conformity with existing laws where needed, and caused investors to consider explicitly national security when putting together proposals to acquire U.S. businesses. We believe that this latter effect has been particularly influential, though it is not possible to quantify its impact.

Sincerely,


Jeffrey Shafer

Comments From the Department of Defense



INTERNATIONAL
SECURITY POLICY

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
2600 DEFENSE PENTAGON
WASHINGTON, DC 20301-2600

7 SEP 1995

In reply refer to:
I-11200/95



Mr. David E. Cooper
Director, Acquisition Policy, Technology
and Competitiveness Issues
National Security and International
Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Cooper:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "FOREIGN INVESTMENT: Implementation of Exon-Florio and Related Amendments," dated August 18, 1995 (GAO Code 705039/OSD Case 9993).

The DoD has reviewed the draft report and generally concurs without comment. Technical comments have been provided directly to the GAO staff. The Department appreciates the opportunity to review the report in draft form.

Sincerely,

Dave Tarbell
Director
Defense Technology Security Administration



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Related GAO Products

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